APPENDIX

APPENDIX "A."

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

Civil Action No. 6095

Tawanda Simmons, - - - - - - Plaintiff,

v.

Louis E. Wolfson, Et Al., - - - Defendants.

OPINION.

This cause comes on before the Court on the defendants' motion to dismiss the plaintiff's Complaint as amended.

The plaintiff is the holder of 2,600 shares of common stock of the Merritt-Chapman & Scott Corporation (hereinafter referred to as "corporation"), having acquired said shares prior to the year 1959 and being the holder of these same shares at the time this action was brought. At all times herein involved, the common stock of the corporation was traded on the New York Stock Exchange. The plaintiff brings this action as an individual shareholder of the corporation, not in a representative capacity nor as a stockholder's derivative action.

The defendants are certain directors and officers of the corporation, and one other person not a director or officer of the corporation, all of whom the Complaint alleges conspired and acted to bring about the worngs which are the subject of the Complaint.

The Complaint alleges that the defendants made secret agreements whereby the non-director defendant purchased

large numbers of shares of the stock of the corporation and sold these shares to the corporation at great profit to himself and the other defendants and expense to the corporation, after the defendants had manipulated the stock market so that the market value of the stock when purchased by the corporation was substantially above its true value. Thus, the plaintiff alleges that the defendants, who controlled the corporation, conspired to defraud the corporation through manipulation of the stock market and by causing the corporation to purchase its own stock at prices which the defendants knew to be above the true value of the stock. The Complaint also alleges that the directors caused the corporation to engage in a number of transactions not in the best interest of the corporation in order that above-mentioned stock purchases might be made. Finally, the plaintiff maintains that the defendant directors failed to disclose their conspiracy and continued wrongdoing in the various proxies, reports and financial statements sent by the corporation to the plaintiff. The Complaint alleges that this fraudulent activity took place between 1961 and 1964.

The plaintiff maintains that this Court has jurisdiction because the facts alleged state a violation of the Securities Act of 1933 and the Securities Exchange Act of 1934 and because the plaintiff is a proper party to recover for such violations. The plaintiff maintains that she has stated a cause of action under Section 17(a) of the Securities Act of 1934 (15 U.S.C. § 77(q)) and Sections 9 (15 U.S.C. § 78(i)), Section 10b (15 U.S.C. § 78(j)), Section 14(a) (15 U.S.C. § 78(n)), Section 18 (15 U.S.C. § 78(r)), and Section 20 (15 U.S.C. § 78(t)) of the Securities Exchange Act of 1934.

Jurisdiction of this Court over the subject matter and the parties to this action rests in the special jurisdiction provisions of the Securities Act and the Securities Ex-

change Act. 15 U.S.C. § 77(u) and 15 U.S.C. § 78(aa). Unless a cause of action is stated under the Securities Acts and the Securities Exchange Act this Court does not have jurisdiction because none of the defendants are residents, nor have they been served with process within the territorial limits of this Court's jurisdiction.

Claim Under Section 17(a) of the 1933 Securities Act.

Section 17(a) makes it unlawful to employ certain fraudulent acts in the "offer or sale of any securities. . . ." Only a person who purchased a security in reliance upon some fraudulent act of a seller has a standing to maintain a complaint under Section 17(a). *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783, 790 (8th Cir. 1967). Plaintiff does not allege that there was any fraud when she purchased stock in the corporation, but that the corporation was defrauded by its own directors when it purchased its own stock. The plaintiff is not a purchaser within the meaning of Section 17(a) and does not have standing to maintain an individual action when the facts alleged show the corporation to be the party defrauded. The complaint states no cause of action under Section 17(a).

Claim Under Section 9 of the 1934 Securities Exchange Act.

Plaintiff's allegations relating to Section 9 are essentially that the defendants manipulated the stock market in violation of Section 9 and then caused the corporation to purchase the over-valued stock. Section 9 provides civil relief to "any person who shall purchase or sell any security at a price which was affected by such act or transaction." While the Complaint may allege a manipulation in violation of Section 9, it fails to allege that the plaintiff was a person who purchased or sold a security at a price

affected by such manipulation. Because the plaintiff was neither a purchaser or seller of stock at a price affected by the alleged manipulation, the Complaint states no cause of action under Section 9.

Even if the Complaint did state a cause of action under Section 9, a claim under that Section would be barred by the applicable statute of limitations. Section 9(e) provides that actions to enforce a liability under Section 9 must be brought within three years after such violation. According to the allegations contained in the Complaint the violations alleged took place no later than 1964. This action was commenced December 5, 1968. A Complaint which on its face shows it is subject to a limitations bar is subject to a motion to dismiss. *Vanderboom* v. *Sexton,* 294 F. Supp. 1178 (W.D. Ark. 1969). Further, in order to state a cause of action where limitations of the type here involved are present, the Complaint must show that the action is brought within the applicable limitations period. *Rosenberg* v. *Hanna & Co.,* 26 F. Supp. 160 (E.D. Pa. 1938). *Chambliss* v. *Coca-Cola Bottling Corporation,* 274 F. Supp. 401, 408, (E.D. Tenn., 1967).

Claim Under Section 10(b) of the 1934 Securities Exchange Act.

Plaintiff's claim under Section 10(b) is met with the same problem which faces her claim under other sections of the Securities Acts. The question is whether a person not a purchaser or seller of a security may have relief under Section 10(b). Plaintiff argues that, although she is not a purchaser or seller, she is thrust into the position of purchaser occupied by the corporation in which she holds stock because the directors of the corporation have breached their duty to the corporation. For situations such as are involved herein, plaintiff maintains that the purchase and sale rule has been abandoned.

There is no question today that Section 10(b) provides civil relief under certain circumstances. However, just as the Courts have allowed civil recovery under Section 10(b), so too have they limited recovery under this Section to purchasers and sellers. *Greenstein* v. *Paul,* 400 F. 2d 580 (2nd Cir. 1968). *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783 (8th Cir. 1967). *Studebaker Corporation* v. *Allied Products Corporation,* 256 F. Supp. 173 (W.D. Mich. 1966).

The Securities Acts were written to prevent fraud in the securities market place. They were not intended to provide a new cause of action for every breach of fiduciary duty on the part of a director of a corporation.

This Court rejects the contention that the purchase and sale rule has been abandoned under Section 10(b) or any other section of the Securities Acts herein involved. Recent decisions in the Supreme Court and the Court of Appeals for the Sixth Circuit affirm the continued existence of the rule. Although these decisions have extended the term purchase and sale to include situations where other types of exchange of stock have taken place, the right of recovery is still limited to that person who is a party to the exchange. *Securities and Exchange Commission* v. *National Securities,* 393 U.S. 453 (1969). *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968), cert. denied, 37 U.S.L. Week 3355 (March 24, 1969).

If a corporation is to be recognized as a distinct legal entity then it is the corporation that is damaged as a result of its purchase of fraudulently over-priced stock. Granted, any injury to the corporation is an indirect injury to each stockholder, but this does not change the fact that injury to the corporation results in a right of action to the corporation, not its stockholders. There is no provision in the Securities Acts which changes this fundamental legal concept.

The plaintiff has failed to state a cause of action under Section 10(b) because the Complaint does not show the plaintiff to be a purchaser or seller of securities in reliance on the fraud alleged.

Claim Under Section 14(a) of the Securities Exchange Act.

Plaintiff's claim under Section 14(a) is that in the various reports, proxies and financial statements sent the plaintiff by the corporation the alleged fraudulent scheme of the defendants was not disclosed. The Complaint does not point to any particular proxy or statement, nor is there any allegation that the omissions resulted in any adverse corporate action which would not have been taken otherwise. The plaintiff argues that the defendants had a duty to report to each stockholder the fact that the defendants were defrauding the company, and failure to so report results in a violation of Section 14(a).

Nothing in the Securities Exchange Act of 1934 or the regulations thereunder requires that directors' breaches of fiduciary duties be revealed in proxy statements. *Robbins* v. *Banner Industries, Inc.*, 285 F. Supp. 758 (S.D.N.Y. 1966). The allegation that false or misleading statements appeared in a proxy statement is not enought to create a cause of action under Section 14. In the absence of some allegation of infringement upon corporate sufferage rights or some corporate action taken as a result of such infringement, no cause of action under Section 14 can be made. Even if there were material misstatements or material omissions of fact, it must be alleged that the corporation took adverse action because of the statements. It must be alleged that the transaction under attack resulted from the misleading proxy statement. *Hoover* v. *Allen*, 241 F. Supp. 213, 230 (S.D.N.Y. 1965). *Boundbrook Water Company* v. *Jaffe*,

284 F. Supp. 702 (D.N.J. 1968). *Kiminsky* v. *Abrams*, 281 F. Supp. 501 (S.D.N.J. 1968).

The plaintiff's general allegation of failure to disclose the breach of fiduciary duty is not sufficient to state a cause of action under Section 14.

Claim Under Section 18 of the 1934 Act.

Plaintiff argues that she has stated a cause of action under Section 18 of the Securities Exchange Act of 1934. Section 18 contains a general proscription against false or misleading statements in any documents required to be filed by the Securities Acts or regulations thereunder, and provides civil relief to anyone damaged through the purchase or sale of a security in reliance on such a statement. The Complaint does not allege that there was any false application, report or document filed pursuant to the 1934 Act. Nor does the plaintiff allege that she purchased or sold a security at a price that was affected by such statement. Therefore, plaintiff does not state a cause of action under this Section.

Claim Under Section 20 of the 1934 Act.

Section 20 of the Securities Exchange Act provides that a controlling person may be jointly and severally liable with a controlled person when the controlled person violates provisions of the Act. Because plaintiff has failed to state a cause of action against any of the defendants, or anyone else, there can be no liability on the part of persons alleged to be controlling them. No cause of action is stated under Section 20.

The heart of the plaintiff's claim is that the controlling directors of the corporation breached their fiduciary duty to the corporation and caused the corporation to purchase its own stock at an excessive price, all to the profit of the

defendants. If, as the plaintiff charges, the directors did act to defraud the corporation, the correct remedy is through a derivative action. If there were violations of the Securities Acts, the corporation may also recover for those violations. The Securities Acts were intended to prevent fraud in the securities market place, and to protect those who are misled by said fraud in the acquisition and disposition of securities. The facts alleged in the plaintiff's Complaint show clearly that while the corporation may have a right of action under the Securities Acts, the plaintiff does not.

Defendants' Motion to Dismiss is sustained and the plaintiff's Complaint is dismissed with prejudice, by separate Order contemporaneously issued herewith.

October 22, 1969.

(s) Henry L. Brooks,
United States District Judge.

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ORDER DISMISSING.

The defendants' motion to dismiss herein having been sustained by order dated September 4, 1969.

It Is Ordered and Adjudged that the plaintiff, Tawanda Simmons, take nothing, that this action is hereby dismissd with prejudice, and that the defendants, Wolfson, Gerbert, Staub, Baker, Hoover, Kosow, and the co-executors of the Estate of Alexander Rittmaster, recover of the plaintiff, Tawanda Simmons, their costs of this action.

(s) Henry L. Brooks,
United States District Judge.

Dated: 10-22-69

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

Civil Action No. 6258

Sandra Lee Simmons Shaw, - - - Plaintiff,

v.

Louis E. Wolfson, Et Al., - - - Defendants.

OPINION.

This cause comes on before the Court on the defendants' motion to dismiss the plaintiff's Complaint as amended.

The plaintiff is the holder of 1,850 shares of common stock of the Merritt-Chapman & Scott Corporation (hereinafter referred to as "corporation"), having acquired 2050 shares of the corporation prior to the year 1960 and being the holder of all but 200 of these shares at the time this action was brought. The 200 shares sold were sold in 1960 and 1961. There is no contention by the plaintiff that any cause of action arises from the selling of these 200 shares. At all times herein involved, the common stock of the corporation was traded on the New York Stock Exchange. The plaintiff brings this action as an individual shareholder of the corporation, not in a representative capacity nor as a stockholder's derivative action.

The defendants are certain directors and officers of the corporation, and three other persons not directors or officers of the corporation, all of whom the Complaint alleges conspired and acted to bring about the wrongs which are the subject of the Complaint.

The Complaint alleges that the defendants made secret agreements whereby the non-director defendants purchased large numbers of shares of the stock of the corporation and sold these shares to the corporation at great profit to themselves and the other director and officer defendants and expense to the corporation, after the defendants had manipulated the stock market so that the market value of the stock when purchased by the corporation was substantially above its true value. Thus, the plaintiff alleges that the defendants, who controlled the corporation, conspired to defraud the corporation through manipulation of the stock market and by causing the corporation to purchase its own stock at prices which the defendants knew to be above the true value of the stock. The Complaint also alleges that the directors caused the corporation to engage in a number of transactions not in the best interest of the corporation in order that above-mentioned stock purchases might be made. Finally, the plaintiff maintains that the defendant directors failed to disclose their conspiracy and continued wrong-doing in the various proxies, reports and financial statements sent by the corporation to the plaintiff. The Complaint alleges that this fraudulent activity took place between 1961 and 1964.

The plaintiff maintains that this Court has jurisdiction because the facts alleged state a violation of the Securities Act of 1933 and the Securities Exchange Act of 1934 and because the plaintiff is a proper party to recover for such violations. The plaintiff maintains that she has stated a cause of action under Section 17(a) of the Securities Act of 1934 (15 U.S.C. § 77(q)) and Section 9 (15 U.S.C. § 78(i)), Section 10b (15 U.S.C. § 78(j)), Section 14(a) (15 U.S.C. § 78(n)), Section 18 (15 U.S.C. § 78 (j)), Section 14(a) (15 U.S.C. § 78(n)), Section 18 (15

U.S.C. § 78(r)), and Section 20 (15 U.S.C. § 78(t)) of the Securities Exchange Act of 1934.

Jurisdiction of this Court over the subject matter and the parties to this action rests in the special jurisdiction provisions of the Securities Act and the Securities Exchange Act. 15 U.S.C. § 77(u) and 15 U.S.C. § 78(aa). Unless a cause of action is stated under the Securities Acts and the Securities Exchange Act this Court does not have jurisdiction because none of the defendants are residents, nor have they been served with process within the territorial limits of this Court's jurisdiction.

Claim Under Section 17(a) of the 1933 Securities Act.

Section 17(a) makes it unlawful to employ certain fraudulent acts in the "offer or sale of any securities. . . ." Only a person who purchased a security in reliance upon some fraudulent act of a seller has a standing to maintain a complaint under Section 17(a). *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783, 790 (8th Cir. 1967). Plaintiff does not allege that there was any fraud when she purchased stock in the corporation, but that the corporation was defrauded by its own directors when it purchased its own stock. The plaintiff is not a purchaser within the meaning of Section 17(a) and does not have standing to maintain an individual action when the facts alleged show the corporation to be the party defrauded. The Complaint states no cause of action under Section 17(a).

Claim Under Section 9 of the 1934 Securities Exchange Act.

Plaintiff's allegations relating to Section 9 are essentially that the defendants manipulated the stock market in violation of Section 9 and then caused the corporation to purchase the over-valued stock. Section 9 provides civil

relief to "any person who shall purchase or sell any security at a price which was affected by such act or transaction." While the Complaint may allege a manipulation in violation of Section 9, it fails to allege that the plaintiff was a person who purchased or sold a security at a price affected by such manipulation. Because the plaintiff was neither a purchaser or seller of stock at a price affected by the alleged manipulation, the Complaint states no cause of action under Section 9.

Even if the Complaint did state a cause of action under Section 9, a claim under that Section would be barred by the applicable statute of limitations. Section 9(e) provides that actions to enforce a liability under Section 9 must be brought within three years after such violation. According to the allegations contained in the Complaint the violations alleged took place no later than 1964. This action was commenced June 16, 1969. A Complaint which on its face shows it is subject to a limitations bar is subject to a motion to dismiss. *Vanderboom* v. *Sexton,* 294 F. Supp. 1178 (W.D. Ark. 1969). Further, in order to state a cause of action where limitations of the type here involved are present, the Complaint must show that the action is brought within the applicable limitations period. *Rosenberg* v. *Hanna & Co.,* 26 F. Supp. 160 (E.D. Pa. 1938). *Chambliss* v. *Coca-Cola Bottling Corporation,* 274 F. Supp. 401, 408 (E. D. Tenn., 1967).

Claim Under Section 10(b) of the 1934 Securities Exchange Act.

Plaintiff's claim under Section 10(b) is met with the same problem which faces her claim under other sections of the Securities Acts. The question is whether a person not a purchaser or seller of a security may have relief under Section 10(b). Plaintiff argues that, although she is not a

purchaser or seller, she is thrust into the position of purchaser occupied by the corporation in which she holds stock because the directors of the corporation have breached their duty to the corporation. For situations such as are involved herein, plaintiff maintains that the purchase and sale rule has been abandoned.

There is no question today that Section 10(b) provides civil relief under certain circumstances. However, just as the Courts have allowed civil recovery under Section 10(b), so too have they limited recovery under this Section to purchasers and sellers. *Greenstein* v. *Paul,* 400 F. 2d 580 (2nd Cir. 1968). *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783 (8th Cir. 1967). *Studebaker Corporation* v. *Allied Products Corporation,* 256 F. Supp. 173 (W.D. Mich. 1966).

The Securities Act were written to prevent fraud in the securities market place. They were not intended to provide a new cause of action for every breach of fiduciary duty on the part of a director of a corporation.

This Court rejects the contention that the purchase and sale rule has been abandoned under Section 10(b) or any other section of the Securities Acts herein involved. Recent decisions in the Supreme Court and the Court of Appeals for the Sixth Circuit affirm the continued existence of the rule. Although these decisions have extended the term purchase and sale to include situations where other types of exchange of stock have taken place, the right of recovery is still limited to that person who is a party to the exchange. *Securities and Exchange Commission* v. *National Securities,* 393 U. S. 453 (1969). *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968), cert. denied, 37 U.S.L. Week 3355 (March 24, 1969).

If a corporation is to be recognized as a distinct legal entity then it is the corporation that is damaged as a result of its purchase of fraudulently over-priced stock.

Granted, any injury to the corporation is an indirect injury to each stockholder, but this does not change the fact that injury to the corporation results in a right of action to the corporation, not its stockholders. There is no provision in the Securities Acts which changes this fundamental legal concept.

The plaintiff has failed to state a cause of action under Section 10(b) because the Complaint does not show the plaintiff to be a purchaser or seller of securities in reliance on the fraud alleged.

Claim Under Section 14(a) of the Securities Exchange Act.

Plaintiff's claim under Section 14(a) is that in the various reports, proxies and financial statements sent the plaintiff by the corporation the alleged fraudulent scheme of the defendants was not disclosed. The Complaint does not point to any particular proxy or statement, nor is there any allegation that the omission resulted in any adverse corporate action which would not have been taken otherwise. The plaintiff argues that the defendants had a duty to report to each stockholder the fact that the defendants were defrauding the company, and failure to so report results in a violation of Section 14(a).

Nothing in the Securities Exchange Act of 1934 or the regulations thereunder requires that directors' breaches of fiduciary duties be revealed in proxy statements. *Robbins* v. *Banner Industries, Inc.*, 285 F. Supp. 758 (S.D.N.Y. 1966). The allegation that false or misleading statements appeared in a proxy statement is not enough to create a cause of action under Section 14. In the absence of some allegation of infringement upon corporate sufferage rights or some corporate action taken as a result of such infringement, no cause of action under Section 14 can be

made. Even if there were material misstatements or material omissions of fact, it must be alleged that the corporation took adverse action because of the statements. It must be alleged that the transaction under attack resulted from the misleading proxy statement. *Hoover* v. *Allen,* 241 F. Supp. 213, 230 (S.D.N.Y. 1965). *Boundbrook Water Company* v. *Jaffe,* 284 F. Supp. 702 (D.N.J. 1968). *Kiminsky* v. *Abrams,* 281 F. Supp. 501 (S.D.N.J. 1968).

The plaintiff's general allegation of failure to disclose the breach of fiduciary duty is not sufficient to state a cause of action under Section 14.

Claim Under Section 18 of the 1934 Act.

Plaintiff argues that she has stated a cause of action under Section 18 of the Securities Exchange Act of 1934. Section 18 contains a general proscription against false or misleading statements in any documents required to be filed by the Securities Acts or regulations thereunder, and provides civil relief to anyone damaged through the purchase or sale of a security in reliance on such a statement. The Complaint does not allege that there was any false application, report or document filed pursuant to the 1934 Act. Nor does plaintiff allege that she purchased or sold a security at a price that was affected by such statement. Therefore, plaintiff does not state a cause of action under this Section.

Claim Under Section 20 of the 1934 Act.

Section 20 of the Securities Exchange Act provides that a controlling person may be jointly and severally liable with a controlled person when the controlled person violates provisions of the Act. Because plaintiff has failed to state a cause of action against any of the defendants, or

anyone else, there can be no liability on the part of persons alleged to be controlling them. No cause of action is stated under Section 20.

The heart of the plaintiff's claim is that the controlling directors of the corporation breached their fiduciary duty to the corporation and caused the corporation to purchase its own stock at an excessive price, all to the profit of the defendants. If, as the plaintiff charges, the directors did act to defraud the corporation, the correct remedy is through a derivative action. If there were violations of the Securities Acts, the corporation may also recover for those violations. The Securities Acts were intended to prevent fraud in the securities market place, and to protect those who are misled by said fraud in the acquisition and disposition of securities. The facts alleged in the plaintiff's Complaint show clearly that while the corporation may have a right of action under the Securities Acts, the plaintiff does not.

Defendants' Motion to Dismiss is sustained and the plaintiff's Complaint is dismissed with prejudice, by separate Order contemporaneously issued herewith.

October, 22, 1969.

(s) Henry L. Brooks,
United States District Judge.

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ORDER DISMISSING.

The defendants' motion to dismiss herein having been sustained by order dated September 4, 1969.

It Is Ordered and Adjudged that the plaintiff, Sandra Lee Simmons Shaw, take nothing, that this action is hereby dismissed with prejudice, and that the defendants, Wolfson, Gerbert, Staub, Baker. Hoover, Kosow, Sherman, Kleven, and the co-executors of the Estate of Alexander Rittmaster, recover of the plaintiff, Sandra Lee Simmons Shaw, their costs of this action.

(s) Henry L. Brooks,
United States District Judge.

Dated: 10-22-69.

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"APPENDIX B."

Nos. 20090-091

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20,090

Twanda R. Simmons, - - - Plaintiff-Appellant,

v.

Louis E. Wolfson, Et Al., - Defendants-Appellees.

No. 20,091

Sandra Lee Simmons Shaw, - Plaintiff-Appellant,

v

Louis E. Wolfson, Et Al., - Defendants-Appellees.,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE.

Decided and Filed July 7, 1970.

Before PHILLIPS, Chief Judge, WEICK and PECK, Circuit Judges.

PER CURIAM. In these consolidated appeals appellants ask us to reverse orders of the District Court granting motions to dismiss their complaints as amended for lack of jurisdiction.

Appellants were owners of shares of common stock in Merritt-Chapman & Scott Corporation, a corporation whose shares were registered and listed on the New York Stock Exchange. Appellants instituted separate, identical actions in the District Court under the provisions of the Securities Act of 1933 (15 U.S.C. §§ 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a et seq.), and Rule 10b-5 of the Securities and Exchange Commission. In these actions appellants asserted a claim for damages against the officers and directors of the corporation and others, for impairment of the value of their shares of stock resulting from an alleged fraudulent conspiracy of the defendants to commit acts which violated the above statutes and rules of the Commision. These acts included alleged secret agreements whereby certain defendants (not officers or directors of the corporation) purchased large numbers of shares of stock of the corporation and sold the shares to the corporation at great profit to themselves and the other defendants, after manipulating the stock market so that the market value of the stock when it was purchased by the corporation was in excess of its true value; that the officers and directors of the corporation engaged in a number of other fraudulent transactions; that these transactions resulted in substantial losses to the corporation; and that said officers and directors issued fraudulent reports and financial statements and concealed their fraudulent practices.

None of the defendants in said actions resided in or was served with process in Kentucky. Jurisdiction of the District Court was based entirely on the Security Act of 1933 and the Security Exchange Act of 1934. The corporation was not made a party to the actions. Appellants sought to recover in their own right and not in a derivative or representative capacity in behalf of the corporation.

It was undisputed that appellants had acquired their shares of stock prior to the time the alleged illegal acts had been committed.

Section 17a of the Securities Act of 1933 makes it unlawful to employ fraudulent acts "in the offer or sale of any securities . . . ." Only purchasers have standing to sue for violations of the 1933 Act. *Greater Iowa Corp.* v. *McLendon*. 378 F. 2d 783, 790 (8th Cir. 1967).

Section 10(b) of the 1934 Act prohibits deception "in connection with the purchase and sale of any security . . . ."

It has long been settled that only purchasers or sellers of securities may invoke the provisions of Section 10(b) of the 1934 Act or Rule 10b-5 of the Commission. *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d 963 (2d Cir. 1969), *cert. applied for* 38 U.S.L. Week 3454; *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (2d Cir. 1952), *cert denied*, 343 U. S. 956.

We recognized the rule in *Mader* v. *Armel*, 402 F. 2d 158 (6th Cir. 1968), *cert. denied*, 394 U. S. 930 (1969), and held that a corporate merger involved a sale or purchase within the meaning of the statute. Appellants contend that we extended the statute in *Mader* and that we should extend it further to embrace the present actions or abandon the requirement that in order to recover one must be a purchaser or a seller. In our opinion, adoption of appellants' contention would do violence to the plain language of the statute and Rule. It would open the door to federal purisdiction in claims for damages against corporate directors and officers arising out of breach of their fiduciary duties.

Appropriate remedies to redress said wrongs now exist in the state courts in derivative actions by shareholders, or in the federal courts where diversity jurisdiction and venue exist. In such actions the corporation is a necessary party. If a corporation has a claim for violation of Section 10b, a

shareholder may sue in a derivative capacity. *Birnbaum* v. *Newport Steel Corp., supra.*

We conclude that the District Court was correct in dismissing the suits for lack of jurisdiction. This disposition of the cases makes it unnecessary for us to consider other contentions advanced by the appellants.

Affirmed.

APPENDIX "C."

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of

any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686.

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale. May 27, 1933, c. 38, Title I, § 13, 48 Stat. 84; June 6, 1934, c. 404, § 207, 48 Stat. 908.

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments or transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section. May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 10, 68 Stat. 686.

§ 78i. Manipulation of security prices

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of sub-

stantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or(C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering

for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege with relation to such security.

(c) It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d) The terms "put", "call", "straddle", "option", or "privilege" as used in this section shall not include any registered warrant, right, or convertible security.

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

(f) The provisions of this section shall not apply to an exempted security. June 6, 1934, c. 404, § 9, 48 Stat. 889.

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 10, 48 Stat. 891.

§ 78n. Proxies

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts

a business in securities through the medium of any such member to give a proxy, consent, or authorization in respect of any security registered on a national securities exchange and carried for the account of a customer in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 14, 48 Stat. 895.

§ 78t. Liabilities of controlling persons

(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.

(c) It shall be unlawful for any director or officer of, or any owner of any of the securities issued by, any issuer of any security registered on a national securities exchange without just cause to hinder, delay, or obstruct the making or filing of any document, report, or information, required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title. June 6, 1934, c. 404, § 20, 48 Stat. 899; May 27, 1936, c. 462, § 6, 49 Stat. 1379.

[¶ 23,704] Reg. § 240.10b-5 (Rule 10b-5) Employment of Manipulative and Deceptive Devices

Reg. § 240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.